

EXHIBIT B

Federal Communications Commission

FCC 15-72

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

American Association of Healthcare
Administrative Management
Petition for Expedited Declaratory Ruling and
Exemption

American Bankers Association
Petition for Exemption

CG Docket No. 02-278

WC Docket No. 07-135

Coalition of Mobile Engagement Providers
Petition for Declaratory Ruling

Consumer Bankers Association
Petition for Declaratory Ruling

Direct Marketing Association
Petition for Forbearance and
Emergency Petition for Special Temporary Relief

Paul D. S. Edwards
Petition for Expedited Clarification and
Declaratory Ruling

Milton H. Fried, Jr., and Richard Evans
Petition for Expedited Declaratory Ruling

Glide Talk, Ltd.
Petition for Expedited Declaratory Ruling

Global Tel*Link Corporation
Petition for Expedited Clarification and
Declaratory Ruling

National Association of Attorneys General
Request for Clarification

Professional Association for Customer
Engagement
Petition for Expedited Declaratory Ruling and/or
Expedited Rulemaking

Retail Industry Leaders Association
Petition for Declaratory Ruling

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Revolution Messaging)
Petition for Expedited Clarification and)
Declaratory Ruling)
)
Rubio's Restaurant, Inc.)
Petition for Expedited Declaratory Ruling)
)
Santander Consumer USA, Inc.)
Petition for Expedited Declaratory Ruling)
)
Stage Stores, Inc.)
Petition for Expedited Declaratory Ruling)
)
TextMe, Inc.)
Petition for Expedited Declaratory Ruling and)
Clarification)
)
United Healthcare Services, Inc.)
Petition for Expedited Declaratory Ruling)
)
YouMail, Inc.)
Petition for Expedited Declaratory Ruling)
)
3G Collect, Inc., and 3G Collect LLC)
Petition for Expedited Declaratory Ruling)
)
ACA International)
Petition for Rulemaking)

DECLARATORY RULING AND ORDER**Adopted: June 18, 2015****Released: July 10, 2015**

By the Commission: Chairman Wheeler and Commissioner Clyburn issuing separate statements;
Commissioners Rosenworcel and O'Rielly approving in part, dissenting in part, and issuing separate
statements; and Commissioner Pai dissenting and issuing a statement.

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message) per event over a three-day period for an affected account;

6) a financial institution must offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,

7) a financial institution must honor opt-out requests immediately.

139. We emphasize that the exemption is limited to messages with the purposes discussed in paras. 129-137 above. The exemption applies to robocalls and texts to wireless numbers only if they are not charged to the recipient, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages) and the financial institution complies with the enumerated conditions we adopt today.

140. *AAHAM*. AAHAM first asks the Commission to clarify and confirm that "the provision of a telephone number by an individual to a healthcare provider constitutes 'prior express consent' for non-telemarketing, healthcare calls to that telephone number by or on behalf of the healthcare provider."⁴⁶⁵ AAHAM also asks that the Commission confirm that, for healthcare calls subject to HIPAA protections, provision of a telephone number to a healthcare provider establishes prior express consent under the TCPA not only for the healthcare provider, but also for calls "by or on behalf of the 'covered entity' as well as its 'business associates.'"⁴⁶⁶

141. The Commission has stated that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."⁴⁶⁷ In the *ACA Declaratory Ruling*, the Commission clarified that a party who provides his wireless number to a creditor as part of a credit application "reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt."⁴⁶⁸ That consent is valid not only for calls made by the original creditor, but also for those made by a third party collector acting on behalf of that creditor.⁴⁶⁹ More recently, in the *GroupMe Declaratory Ruling*, the Commission stated that "the scope of consent must be determined upon the facts of each situation."⁴⁷⁰ Nothing in these previous statements regarding consent prohibits us from granting the clarification AAHAM and supporting commenters request.⁴⁷¹ We note, however, that "covered entity" and "business

⁴⁶⁵ AAHAM Petition at 1-2. AAHAM defines "healthcare provider" to include "hospitals, emergency care centers, medical physician or service offices, poison control centers, and other healthcare professionals." *Id.* at 1 n.4.

⁴⁶⁶ AAHAM Petition at 5.

⁴⁶⁷ 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31.

⁴⁶⁸ *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9.

⁴⁶⁹ *See id.* at 565, para. 10.

⁴⁷⁰ *GroupMe Declaratory Ruling*, 29 FCC Rcd 3442 at *4, para. 11.

⁴⁷¹ NACDS Comments on AAHAM Petition at 4; PCMA Comments on AAHAM Petition at 2-3; Rite Aid Comments on AAHAM Petition at 3-4; *see also* Letter from Rep. Scott R. Tipton, U.S. Congress, to Tom Wheeler, Chairman, FCC, at 1-2 (April 2, 2015). *See* Appendix A for a list of all commenters on the AAHAM Petition.

In its comments, Rite Aid asks the Commission to address certain additional issues. Rite Aid Comments on AAHAM Petition at 1. It asks the Commission to "resolve [] confusion by declaring that the exemption for HIPAA-related calls to wireless numbers is the same as that for residential lines, i.e., that no prior consent is required." *Id.* at 7. It also asks the Commission to grant a retroactive waiver to it "and other similarly situated parties who have been

(continued....)

associates” are defined terms in the HIPAA privacy rules.⁴⁷² The clarification we grant extends only to those terms within the scope of HIPAA, which is not necessarily as broad as the scope AAHAM requests. We clarify, therefore, that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA⁴⁷³ by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.⁴⁷⁴

142. AAHAM also asks the Commission to clarify consent with regard to incapacitated patients. AAHAM asserts that in situations such as where a patient may be incapacitated and unable to provide a telephone number directly to a healthcare provider, but a third party intermediary provides the number, the provision of the phone number by the third party should constitute prior express consent “for healthcare calls to that number unless and until the patient requests otherwise.”⁴⁷⁵ The Commission has stated that “an intermediary may only convey consent that has actually been provided by the consumer; the intermediary cannot provide consent on behalf of the consumer.”⁴⁷⁶ We recognize that in certain healthcare situations, however, it may be impossible for a caller to obtain prior express consent. We clarify, therefore, that where a party is unable to consent because of medical incapacity,⁴⁷⁷ prior express consent to make healthcare calls subject to HIPAA may be obtained from a third party—much as a third party may consent to medical treatment on an incapacitated party’s behalf. A caller may make healthcare calls subject to HIPAA during that period of incapacity, based on the third party’s prior express consent. Likewise, just as a third party’s ability to consent to medical treatment on behalf of another ends at the time the patient is capable of consenting on his own behalf, the prior express consent provided by the third party is no longer valid once the period of incapacity ends. A caller seeking to make healthcare calls

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subject to TCPA-related litigation involving any alleged prior express consent requirement for HIPAA-related calls to wireless numbers to the extent necessary.” *Id.* at 7-8. We decline to fully address this request for clarification and retroactive waiver raised in a comment to a pending Petition. Rather, we point to footnote 7 of the Public Notice for the AAHAM Petition, and suggest a comparison between 47 C.F.R. § 64.1200(a)(1), § 64.1200(a)(2), and § 64.1200(a)(3)(v). *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and Exemption From American Association of Healthcare Administrative Management*, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 15267 at *1 n.7 (2014).

⁴⁷² *See* 45 C.F.R. § 160.103; *see also* 47 C.F.R. § 64.1200(a)(2).

⁴⁷³ *See* 45 C.F.R. § 160.103 (definition of “health care”). While AAHAM indicates that HIPAA’s privacy rules define “health care messages,” we find no such definition in the rules. *See* AAHAM Petition at 3 n.7. The definition AAHAM provides in its Petition is the definition of “health care.” We note, additionally, that insurance-coverage calls, which are included in AAHAM’s list of “healthcare calls,” are not necessarily among the topics in HIPAA’s definition of “health care.” AAHAM Petition at 3; *see also* Shields Comments on AAHAM Petition at 2. Our clarification extends only to calls that are subject to HIPAA.

⁴⁷⁴ By “within the scope of consent given, and absent instructions to the contrary,” we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.

⁴⁷⁵ AAHAM Petition at 7.

⁴⁷⁶ *GroupMe Declaratory Ruling*, 29 FCC Rcd 3442 at *5, para. 14. In stating this previous determination, we note that Commenter NACDS asks that we clarify that a telephone number provided to a pharmacy by a doctor’s office in lieu of a patient who is too ill to do so, is prior express consent. NACDS Comments on AAHAM Petition at 7. We reiterate that, according to the Commission’s clarification in *GroupMe*, an intermediary may only convey consent that was provided by the consumer. *See GroupMe Declaratory Ruling*, 29 FCC Rcd 3442 at *5, para. 14.

⁴⁷⁷ When we refer to “incapacity,” we use the term in its legal sense under the applicable statutes, common law, or judicial decisions. We do not speak of “incapacity” in some loose colloquial sense. Thus, the relevant contours of “capacity”—including the duration of any “incapacity”—are to be assessed with reference to those legal indicia.

subject to HIPAA to a patient who is no longer incapacitated must obtain the prior express consent of the called party.

143. Finally, AAHAM asks the Commission to exempt from the TCPA's prior-express-consent requirement certain non-telemarketing, healthcare calls that are not charged to the called party.⁴⁷⁸ AAHAM notes that the calls provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions⁴⁷⁹ including: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, home healthcare instructions, available payment options, insurance coverage payment outreach and eligibility, account communications and payment notifications, Social Security disability eligibility, and "health care messages" as defined by HIPAA.⁴⁸⁰ AAHAM points out that non-telemarketing healthcare calls and healthcare calls subject to HIPAA are already exempt from the TCPA's restrictions on prerecorded voice message calls to residential numbers, which is an indication of the public interest in receiving these calls by means of a limited exemption.⁴⁸¹ AAHAM also references the conditions the Commission set forth in the *Cargo Airline Order* for each free-to-end-user voice call or text message call, and agrees to conditions consistent therewith.⁴⁸²

144. Following the analysis the Commission established in the *Cargo Airline Order*, we consider whether AAHAM's members are capable of satisfying the first part of our section 227(b)(2)(C) inquiry—that is, proposed healthcare message notifications will "not [be] charged to the called party."⁴⁸³ AAHAM states that its members are capable of providing these calls by, among other options, "using third-party solutions identified by [Cargo Airline Association] that can be deployed for subscribers of the four nationwide wireless carriers."⁴⁸⁴ As the Commission did in the *Cargo Airline Order*, we interpret the TCPA's "no charge" requirement to "preclude exempting notifications that count against the recipient's plan minutes or texts."⁴⁸⁵

145. Next, we consider whether AAHAM's proposal will allow us to grant the requested exemption while protecting consumers' privacy interests through conditions, as the statutory exemption provision contemplates.⁴⁸⁶ First, we consider the content of the messages. AAHAM notes that the calls provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions.⁴⁸⁷ A supporting commenter states that the "uncharged, informational healthcare messages it and other healthcare providers may send are [] the kind of communications that consumers desire, expect,

⁴⁷⁸ AAHAM Petition at 2.

⁴⁷⁹ *Id.* at 10.

⁴⁸⁰ *Id.* at 2-3. Regarding "health care messages," see n. 473, *supra*.

⁴⁸¹ *Id.* at 9-10. In the 2012 TCPA Order, the Commission exempted from its consent, identification, time-of-day, opt-out, and abandoned call requirements "all prerecorded health care-related calls to residential lines that are subject to HIPAA." 2012 TCPA Order, 27 FCC Rcd at 1852, para. 57; see 47 C.F.R. § 64.1200(a)(2), (a)(3)(v). Subsequent to that Order, HIPAA-covered autodialed, prerecorded voice, and artificial voice calls to a wireless number are exempt from the TCPA's written consent requirement but are still covered by the general consent requirement. Compare 47 C.F.R. § 64.1200(a)(2) with 47 C.F.R. § 64.1200(a)(1).

⁴⁸² AAHAM Petition at 11.

⁴⁸³ 47 U.S.C. § 227(b)(2)(C).

⁴⁸⁴ AAHAM Petition at 11.

⁴⁸⁵ *Cargo Airline Order*, 29 FCC Rcd 3432 at *3, para. 12.

⁴⁸⁶ 47 U.S.C. § 227(b)(2)(C); *Cargo Airline Order*, 29 FCC Rcd 3432 at *4, para. 13.

⁴⁸⁷ AAHAM Petition at 10.

and benefit from.”⁴⁸⁸

146. While these statements regarding the public’s interest in and need for timely receipt of these calls are likely true regarding the majority of the types of calls AAHAM lists in its Petition, we are concerned that these policy arguments are not true for all types of calls AAHAM wishes to make under the TCPA’s exemption provision. For example, while we recognize the exigency and public interest in calls regarding post-discharge follow-up intended to prevent readmission, or prescription notifications, we fail to see the same exigency and public interest in calls regarding account communications and payment notifications, or Social Security disability eligibility.⁴⁸⁹ While this second group of calls regarding billing and accounts may convey information, we cannot find that they warrant the same treatment as calls for healthcare treatment purposes. Timely delivery of these types of messages is not critical to a called party’s healthcare, and they therefore do not justify setting aside a consumer’s privacy interests in favor of an exemption for them. We grant the exemption, with the conditions below, but restrict it to calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.⁴⁹⁰ We also clarify that HIPAA privacy rules shall control the content of the informational message where applicable, such as where the message attempts to relate information of a sensitive or personal nature; as one commenter cautions: “the information provided in these exempted voice calls and texts must not be of such a personal nature that it would violate the privacy” of the patient if, for example, another person received the message.⁴⁹¹ We therefore grant the exemption for calls subject to HIPAA, but limit this exemption by excluding any calls contained therein that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content.⁴⁹²

147. *Conditions on AAHAM’s Request.* We adopt the following conditions for each exempted call (voice call or text message) made by or on behalf of a healthcare provider:

- 1) voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;

⁴⁸⁸ Rite Aid Comments on AAHAM Petition at 9-10 (internal quotation marks omitted).

⁴⁸⁹ AAHAM Petition at 3. While calls regarding Social Security disability eligibility may, in fact, raise issues regarding the timely provision of medical treatment, these issues are not readily apparent. Nothing in the record indicates what the content of these calls may be—whether they relate to eligibility for treatment, eligibility for non-healthcare services, or eligibility for other services. Without additional information, we are not able to determine whether the calls contain exigent information for a true healthcare treatment purpose, as opposed to information regarding billing and accounts information that is not of a true healthcare treatment purpose.

⁴⁹⁰ See *id.* at 2-3. For example, from the list AAHAM includes in its Petition, the following types of calls would likely be exempt because of exigency and a true healthcare purpose: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions. See AAHAM Petition at 2-3.

⁴⁹¹ See *Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3-4 (filed April 28, 2015) (expressing concern that “if the call is health related—a test result necessitating a doctor’s appointment, the need to fill a prescription—it would be a serious breach of privacy for one person to hear about these issues when they apply to another”); *Ex Parte* Letter from Victoria Di Tomasco, AAHAM President, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed June 11, 2015).

⁴⁹² See *Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 5 (filed Feb. 23, 2015) (objecting to granting AAHAM protection for “non-telemarketing calls that healthcare providers ordinarily make, including debt collection calls”).

- 2) voice calls and text messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures would need to be made at the beginning of the call);
- 3) voice calls and text messages are strictly limited to the purposes permitted in para. 146 above; must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules ;
- 4) voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
- 5) a healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider;
- 6) a healthcare provider must offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future healthcare calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,
- 7) a healthcare provider must honor the opt-out requests immediately.

148. We emphasize that the exemption is limited to messages with the purposes discussed in para. 146 above. The exemption applies to robocalls and texts to wireless numbers only if they are not charged to the recipient, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages) and the healthcare providers complies with the enumerated conditions we adopt today.

8. Waiver and Additional Exemption Requests

149. In a footnote to its Petition, Glide states: "If the Commission declines to issue the requested declaratory ruling, it should grant [Glide] a retroactive waiver for the [a]pp's invitation mechanism."⁴⁹³ As support for this waiver request, Glide cites to Section 1.3 of the Commission's rules, which provides that "[t]he provisions of this chapter may be . . . waived for good cause shown, in whole or in part, at any time by the Commission."⁴⁹⁴ In this Declaratory Ruling and Order, we decline to issue the clarification Glide has requested. We also decline to grant a retroactive waiver for the Glide app's invitational message function.

150. The Commission may waive any of its rules for good cause shown.⁴⁹⁵ A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.⁴⁹⁶ Glide has not pled—much less pled with particularity—facts and circumstances that warrant a waiver.⁴⁹⁷ Its entire argument for waiver

⁴⁹³ Glide Petition at 5 n.9.

⁴⁹⁴ 47 C.F.R. § 1.3.

⁴⁹⁵ *Id.* § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

⁴⁹⁶ *Northeast Cellular Tel. Co.*, 897 F.2d at 1166.

⁴⁹⁷ See Glide Petition at 5 n.9; *WAIT Radio*, 418 F.2d at 1157 (stating that an applicant seeking a waiver faces a "high hurdle" and "must plead with particularity the facts and circumstances which warrant such action") (citation and internal quotation marks omitted).